

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE SUBPOENA DIRECTED TO	:	MISCELLANEOUS
ANDREW MAYKUTH	:	NO. 05-0228

O'NEILL, J.

MARCH 17, 2006

MEMORANDUM

The instant subpoena seeking to compel the deposition of a Philadelphia Inquirer reporter, Andrew Maykuth, by written questions pursuant to Federal Rule of Civil Procedure 31 was filed on December 19, 2005 by parties to an action in the United States District Court for the Northern District of California, Bowoto v. Chevron Texaco Corp., No. 99-2506. Plaintiffs in that action are Nigerian citizens who allege that defendant, Chevron, a United States based corporation, was involved in the commission of human rights abuses in Nigeria. The facts of that action are discussed in Judge Illiston's March 22, 2004 opinion, Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229 (N.D. Cal. 2004). Before me now is Maykuth's motion to quash or, in the alternative, motion to modify the subpoena, defendant's opposition, plaintiffs' response, defendant's further opposition, and Maykuth's reply thereto.

Maykuth published an article in the Philadelphia Inquirer on July 11, 1999 regarding the events underlying the Bowoto action. His article reported on the history of oil production in the Nigerian delta, protests which the Ijaw people of Nigeria had carried out against Chevron and other oil companies in Nigeria, a long standing feud between the Ijaw Clan (who inhabit Opia and Ikenyan) and the Itsekiri (who inhabit neighboring villages), and various attacks on the Ijaw villages in 1999. Toward the end of the article, Maykuth reported that two of the Ijaw plaintiffs stated that they may have carried out an attack on an Itsekiri village prior to the attacks on Opia

and Ikenyan.¹ Chevron believes that these statements undermine plaintiffs' assertions that they are peaceful, law abiding citizens and support Chevron's argument that a long standing feud between the Itsekiri and Ijaw peoples was the motivation behind the attacks on Opia and Ikenyan rather than any actions by Chevron. Chevron's objective is to have Maykuth verify that these statements are accurate.²

However, in response to Chevron's two questions on direct examination, plaintiffs' designated eighty nine questions for cross examination, ranging from Maykuth's general newsgathering activities to the notes of his interviews in Nigeria, the number of interviews he

¹Maykuth's article states, in relevant part:

Yet conversation with the Ijaws over several days suggests another aspect to the situation. For as long as anyone can remember, the villagers say, they have been fighting over land and fishing rights with a smaller ethnic group, the Itsekiri. The Itsekiri moved into the delta several hundred years ago, which makes them recent arrivals to the Ijaw.

* * *

Three years ago the Itsekiri persuaded the national government to move the local governmental seat from an Ijaw community to one of their own, and with it went a great deal of patronage. The move outraged the Ijaws. The two groups have been exchanging revenge attacks ever since.

Last October, Ijaw warriors raided an Itsekiri market in the provincial capital, Warri. The warriors gunned down 30 people, burned homes and sacked a police station. A few days later, 35 Ijaws died in a counterattack on one of their towns.

On Jan. 4, 1998, a year to the day before the soldiers came and burned Opia, Itsekiri commandos raided and incinerated Opia.

"As men, we could not let such an act go unanswered," said Anthony Lawuru, an Opia official.

"Let's just say one or two Itsekiri villages disappeared," said Benson Edekou, Opia's public relations officer.

And so Opia's leaders were not entirely surprised when Nigerian soldiers attacked their communities on Jan. 4 this year. And despite the Chevron helicopters, they have an idea who was behind it. They say the Itsekiri masterminded the attack with their allies in the army.

²Because the Northern District of California does not have jurisdiction over Maykuth, the subpoena was sought in the Eastern District of Pennsylvania. See Fed. R. Civ. P. 45(b)(2).

conducted there, his proficiency in the local languages, whether he used interpreters, and where he traveled in Nigeria. In reply, Chevron served Maykuth with a redirect question seeking unpublished information, namely the identity of the person who told Maykuth that the Itsekiri plotted the January 4, 1999 attack on Opia. Thereafter, plaintiff served Maykuth with an additional twenty eight recross questions seeking information regarding the location and duration of the conversations Maykuth had with the person who told him that the Itsekiri plotted the attack, everything said during that conversation, and whether he used an interpreter during that conversation.

In his motion to quash the subpoena, Maykuth argues that the subpoena, seeking compelled disclosure of newsgathering material: (1) violates his rights under the reporter's privilege; and (2) is overly broad and unduly burdensome. Maykuth therefore requests that I quash the subpoena or, at a minimum, limit Maykuth's testimony to answering questions directly relating to whether Lawuru and Edekou made the statements attributed to them in the article. For the reasons that follow, I will limit Maykuth's testimony in this fashion.

With respect to the reporter's privilege, Maykuth argues that Chevron's arguments in support of the subpoena do not meet the three part test enunciated by the Court of Appeals in Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979). To overcome the media's federal common law qualified privilege the seeker of information must meet three criteria:

First, the movant must demonstrate that he has made an effort to obtain the information from other sources. Second, he must demonstrate that the only access to the information sought is through the journalist and her sources. Finally, the movant must persuade the Court that the information sought is crucial to the claim.

United States v. Cuthbertson, 651 F.2d 189, 195-96 (3d Cir. 1981) ("Cuthbertson II") quoting

United States v. Criden, 633 F.2d 346 (3d Cir. 1980) (discussing the policy rationales and balance of interests supporting the reporter's privilege and the Riley three part test) and Riley, 612 F.2d 708 (discussing the public policies supporting the reporter's privilege and balancing the countervailing interests) citing Branzburg v. Hayes, 408 U.S. 665, 707 (1972) (discussing the reporter's privilege); see also United States v. Cuthbertson, 630 F.2d 139, 147-48 (3d Cir. 1980) (extending the reporter's privilege to criminal cases and expanding Riley to protect reporters' unpublished materials) ("Cuthbertson I").³ The Court of Appeals has defined "crucial to the claim" in two ways: "necessary for the development of the case" and "going to the heart of the claim." See Riley, 612 F.2d at 717.

The analysis of these three criteria is made on a case by case basis with a view to the circumstances in which the case arose. See id. at 716 (holding that the assertion of the reporter's privilege should be judged on a case by case basis in light of the balance of the interests supporting the reporter's privilege and the interests of litigants in seeking material, relevant, and crucial information). The reporter's privilege applies equally to civil and criminal cases, Cuthbertson I, 630 F.2d at 147 (holding that a newsgatherer's "interest in protecting confidential sources, preventing intrusion into the editorial process, and avoiding the possibility of self-censorship created compelled disclosure of sources and unpublished notes does not change because a case is civil or criminal."); see also United States v. Burke, 700 F.2d 70, (2d Cir. 1983) ("We see no legally-principled reason for drawing a distinction between civil and criminal cases when considering whether the reporter's interest in confidentiality should yield to the moving

³The Court of Appeals has noted that the interests behind the Pennsylvania Shield Law, 42 Pa. Cons. Stat. § 5942, are congruent with the federal common law. Riley v. City of Chester, 612 F.2d 708, 715 (3d Cir. 1979).

party's need for probative evidence."), and protects both confidential and nonconfidential sources, published and unpublished information, Criden, 633 F.2d at 358 (declining to hold that a source's expectation of confidentiality should be a threshold criterion for supporting the reporter's privilege but acknowledging that a party seeking disclosure of information "probably should be required to prove less to obtain a reporter's version of a conversation already voluntarily disclosed by the self-confessed source than to obtain the identity of the source itself."); Cuthbertson I, 630 F.2d at 147 ("[W]e hold that the privilege extends to unpublished materials in the possession of [the newsgatherer]. Of course, the lack of a confidential source may be an important element in balancing the defendant's need for the material sought against the interests of the journalist in preventing production in a particular case.") (citations omitted); see also Shoen v. Shoen, 5 F.3d 1289, 1295-96 (9th Cir. 1993) ("[W]e hold that the journalist's privilege applies to a journalist's resource materials even in the absence of the element of confidentiality. We add, however, that the absence of confidentiality may be considered in the balance of competing interests as a factor that diminishes the journalist's, and the public's, interest in non-disclosure.").

Chevron attempted to verify the statements made in the article by deposing plaintiffs, but Lawuru and Edekou repeatedly denied making such statements in their depositions and requests for admissions. See Criden, 633 F.2d at 359 (concluding that where the witness' testimony leaves questions unresolved "[the reporter] is the most logical source of information about the conversation with [the interviewee] because she was the other participant in it."). Chevron cannot verify that plaintiffs made these statements through any source other than Maykuth because he appears to be the only person to whom plaintiffs allegedly made these statements.

See In re Subpoena Directed to Anne Barnard, 1999 WL 38269, at * 3 (E.D. Pa. Jan. 25, 1999).

The article itself, although self authenticating for purposes of admitting the evidence, see Fed. R. Evid. 902(6), is not sufficient to verify or prove false the statements recounted by Maykuth.

Although Chevron has deposed other individuals with first hand knowledge of the attacks on the Ijaw villages, none of these individuals has any knowledge of the statements made to Maykuth.

Chevron also satisfies the third criterion: Maykuth's verification evidence is relevant, material, and "crucial" to Chevron's defense because the truth of these statements and whether they were actually said go directly to the heart of Bowoto action, namely whether the Itsekiri were motivated by Chevron or a long standing feud in their attack on the Ijaw villages. See In re Grand Jury Empaneled, 99 F. Supp. 2d 496, 501 (D.N.J. 2000) ("Although Criden intimated that the party seeking the privileged information must demonstrate that the information is "crucial" to the claim, the [seeker of information] need not satisfy such a high burden in this case. The seeker of information is required to prove less where, as here, the information sought is nonconfidential and the source self-avowed.") citing Criden, 633 F.2d at 359 and Cuthbertson I, 630 F.2d at 147. Chevron's need for this information goes beyond a desire to impeach the testimony of these two plaintiffs; this information strikes at the very heart of plaintiffs' case, namely whether any action by Chevron was the cause of the Itsekiri attack on Ijaw villages, and is being offered for the truth of the statements. Contra Damiano v. Sony Music Entertainment, Inc., 168 F.R.D. 485, 497 (D.N.J. 1996) ("the material in question is being sought to impeach the defendant with his own words, and impeachment will not suffice as it does not go to the heart of the plaintiff's claim.") quoting Riley, 612 F.2d at 717 (internal quotations omitted); see Fed. R.

Evid. 801(d)(2). Therefore, the reporter's privilege does not protect Maykuth from answering Chevron's two direct questions seeking to verify whether plaintiffs made the statements that he quoted in his article.⁴

However, I agree with Maykuth that the breadth of plaintiffs' cross examination questions, Chevron's redirect, and plaintiffs' recross is overbroad and should be limited to verifying whether plaintiffs made the quoted statements. See Fed. R. Civ. P. 45(c)(3). The following questions will be struck from plaintiffs' cross examination because they fail to meet the strictures of the reporter's privilege: Nos. 24-28 & 80-83.⁵ Chevron's redirect and plaintiffs'

⁴Chevron asks Maykuth to answer the following two questions:

3. The article states: "On Jan. 4, 1998, a year to the day before the soldiers came and burned Opia, Itsekiri commandos raided and incinerated Opia. 'As men, we could not let such an act go unanswered,'" said Anthony Lawuru, and Opia official." Did someone identifying himself as Anthony Lawuru tell you, in words or substance, that "as men, we could not let such an act go unanswered?"
4. The article continues: "'Let's just say one or two Itsekiri villages disappeared,' said Benson Edekou, Opia's public relations officer." Did someone identifying himself as Benson Edekou tell you, in words or substance, that "Let' just say one or two Itsekiri villages disappeared?"

⁵Plaintiffs asks Maykuth to answer the following overbroad questions:

24. Please give your best estimate of the average number of articles you have written during each year you have been a reporter.
25. Please state the number of times you have been to Nigeria, including whether the trip that resulted in the publication of the article attached as Exhibit A to the Defendants' Notice of Deposition by Written Questions of Andrew Maykuth was your first trip to Nigeria.
26. Please state the length of time you were in Nigeria on each trip, including the trip that resulted in the publication of the article Incident at Opia attached as Exhibit A to the Defendants' Notice of Deposition by Written Questions of Andrew Maykuth.
27. Please state what the purpose of each trip was.
28. Please state how many people YOU interviewed in Nigeria in writing the article attached as Exhibit A to the Defendants' Notice of Deposition by Written Questions of Andrew Maykuth.

* * *

recross questions will be struck because they are similarly overbroad and Chevron's redirect is beyond the scope of direct and cross examinations.⁶ See Fed. R. Evid. 611(b).

An appropriate order follows.

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80. How did the idea for the article attached as Exhibit A to the Defendants' Notice of Deposition by Written Questions of Andrew Maykuth come about?
 81. Was the idea for the article attached as Exhibit A to the Defendants' Notice of Deposition by Written Questions of Andrew Maykuth your idea?
 82. Was the idea for the article suggested by someone who works for your newspaper?
 83. Was the idea for the article suggested by someone outside your newspaper?

⁶Chevron asks Maykuth to answer the following question that is beyond the scope of direct and cross:

1. The article continues, "And so Opia leaders were not entirely surprised when Nigerian soldiers attacked their communities on Jan. 4 [1999]. And despite the Chevron helicopters, they have an idea who was behind it. They say the Itsekiri masterminded the attack with their allies in the army." Who told you that the Itsekiri masterminded the January 4, 1999 attack on Opia?

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ANDREW MAYKUTH	:	NO. 05-0228

ORDER

AND NOW, this 17th day of March 2006, upon consideration of Maykuth's motion to quash or, in the alternative, motion to modify the subpoena, defendant's opposition, plaintiffs' response, defendant's further opposition, and Maykuth's reply thereto, and for the reasons set forth in the accompanying memorandum, it is ORDERED that defendant's alternative motion to modify the subpoena is GRANTED. It is further ORDERED that plaintiffs' cross examination questions Nos. 24-28 & 80-83, defendant's redirect, and plaintiffs' recross questions are struck from the parties' depositions by written questions. Plaintiffs' other cross examination questions shall be allowed.

s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR, J.